No. 12,115

IN THE

United States Court of Appeals

For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and GENERAL ENGINEERING AND DRYDOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and HENRY MANEKE and MOLLIE MANEKE, Parents of Adrian Maneke, Deceased,

Appellees.

APPELLANTS' OPENING BRIEF.

LEONARD, HANNA & BROPHY,
DONALD R. BROPHY,
IVAN A. SCHWAB,
465 California Street, San Francisco 4, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Engineering and Dry Dock Corporation was insured against liability for compensation benefits payable under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. Code Secs. 901-950) by Industrial Indemnity Exchange.

An application for benefits under the Longshoremen's and Harbor Workers' Compensation Act was filed within the time allowed by law with Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, by Henry Maneke and Mollie Maneke, father and mother of Adrian Maneke. (Tr. 20, 23) The answer filed by the insurance carrier with the Deputy Commissioner denied that the claimants were dependent upon their deceased son for support at the time of injury but admitted all other material facts. (Tr. 22, 25)

By transfer pursuant to 33 U. S. Code, Sec. 919(g), a hearing was held on October 21, 1947, at Lebanon, Missouri, before Leonard C. Brown, Deputy Commissioner for the Tenth Compensation District. (Tr. 29) Thereafter, on February 19, 1948, Appellee Warren H. Pillsbury, as Deputy Commissioner, filed in his office and served upon the parties a Compensation Order—Award of Death Benefit. (Tr. 26) Within the time allowed by law and pursuant to the provisions of 33 U. S. Code Sec. 921, appellants filed their complaint for injunction against the enforcement of the order in the United States District Court, Northern District of California, Southern Division, con-

tending that the Compensation Order—Award of Death Benefit was not in accordance with law. (Tr. 2)

On July 6, 1948, the Honorable Michael J. Roche, District Judge, made and filed an order dismissing the complaint for injunction. (Tr. 11) Notice of appeal was filed August 5, 1948. (Tr. 12) Cost bond on appeal was filed and approved on August 5, 1948. (Tr. 13)

Jurisdiction of this Court upon appeal is invoked under 28 U. S. Code 1291 (formerly Section 128(a) of the Judicial Code).

STATEMENT OF THE CASE.

Adrian Maneke was discharged from the army on January 4, 1946. (Tr. 51) At that time and at all times up to the date of hearing on October 21, 1947, his parents lived on a farm near Lebanon, Missouri, which was owned by the father and had been purchased by him with moneys obtained from the sale of another farm which he had previously owned. (Tr. 46) The father testified that the farm cost him between $5000 and $6000 (Tr. 34), and the verified claim filed by the parents in July, 1947, states that at that time they owned real estate of the assessed value of $5000, on which there was no indebtedness. (Tr. 21) Adrian Maneke obtained employment in Kansas City, Missouri, in March, 1946, and continued to be employed there until he left for California in January, 1947. (Tr. 60) During this period of employment, it was

the regular practice of Adrian to drive from Kansas City to Lebanon, Missouri, every two weeks to spend the week-end with his parents. (Tr. 64, 65) On these visits he made contributions to his father that were used to make improvements on the farm. These contributions for the period that the decedent worked in Kansas City totaled $275 for improvements to the barn and $165 for improvements to the house. (Tr. 39) In addition, Adrian would deliver his pay check to his mother to be cashed for him, with instructions to "take it and get what you need out of it". (Tr. 64) The mother testified that the amount taken out by her averaged $10 per week during the time that Adrian was employed at Kansas City. (Tr. 65)

Adrian quit his employment in Kansas City and left Missouri for California in January, 1947. (Tr. 61) He lived first in Los Angeles, then at Modesto, and finally at Oakland until he was fatally injured on June 26, 1947. (Tr. 55) He had worked only one month for General Engineering and Dry Dock Corporation at the time he was injured. (Tr. 55) During the six months that Adrian was in California he sent money to his parents on only one occasion. The testimony of the father in that respect is as follows:

"Q. Well, how often after he went to California did he send you money?

A. Well, he just sent once to me after he went to California. You see, he hadn't been out there very long.

Q. He had been there six months, I thought you said?

A. He was.

Q. But he only sent you money once?

A. One time.

Q. And when was that?

A. Well, it was about a month or so after he went out there.

Q. What was the amout of it?

A. Fifty dollars, about $50.00, something like that.

Q. That would be some time in February?

A. Well, I imagine it was February or March, somewhere along there." (Tr. 38)

At the time of his death, Adrian had a bank account of approximately $1700 in the Lebanon State Bank. (Tr. 62) The mother had authority to draw checks on this account but had never done so because no need for money from the bank account had ever arisen. (Tr. 68) The father had a bank account at all times since 1944 until the day of the hearing and none of the money in that account had been received from Adrian. (Tr. 43)

SPECIFICATIONS OF ERROR.

I.

That the District Court erred in granting the motion to dismiss the complaint for an injunction against the enforcement of the Compensation Order—Award of Death Benefit entered by the appellee Pillsbury because said Compensation Order—Award of Death Benefit was not in accordance with law in that there

was no substantial evidence in the proceedings before appellee Pillsbury to support the finding that the claimants in said proceedings were dependent upon the deceased employee to a substantial extent for support at the time of his injury.

II.

That the District Court also erred in granting the motion to dismiss because said Compensation Order—Award of Death Benefit was not in accordance with law in that under the Longshoremen's and Harbor Workers' Compensation Act benefits are payable to partial dependents only "during such dependency" and the evidence in the proceedings before appellee Pillsbury established that if any dependency existed at the time of injury it had terminated prior to the entry of said Order.

ARGUMENT.

I.

THE DEATH BENEFIT AWARD WAS NOT IN ACCORDANCE WITH LAW BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE THAT THE PARENTS WERE DEPENDENT UPON THE DECEASED EMPLOYEE AT THE TIME OF INJURY.

Subdivision (b) of Section 9 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code 909(b), provides for the payment of a death benefit to the parents of a deceased employee "if dependent upon him at the time of the injury". Subdivision (f) of Section 9 further provides:

"All questions of dependency shall be determined as of the time of the injury."

The record in this case does not furnish support for the finding of the Deputy Commissioner that the parents were dependent upon the deceased employee as of the time of the injury. The requirements for dependency under the Longshoremen's and Harbor Workers' Compensation Act are well stated in *Weeks v. Behrend,* 135 Fed. (2d) 258. In that case a wife was living apart from her husband by mutual consent. In holding that the evidence would not support a finding of the Deputy Commissioner that the wife was in fact dependent for support on the husband at the time of injury, the Court said: "Appellant's husband made no regular contributions to her support. Though partial dependency will sustain an award of compensation, occasional contributions will not sustain a finding of partial dependency unless they are 'necessary and relied on'."

Another case giving a good statement of the general rule is *Hancock v. Industrial Commission,* 58 Utah 192, 198 Pac. 169. In holding that the parents were not dependent upon a deceased employee, the Court stated: "Alleged dependents, such as the plaintiffs, are required to show facts upon which such dependency exists. The statute makes the wife and certain minor children presumptively dependents. But dependency in other cases must be based upon proof of facts creating such dependency. It is settled in this state, and the same is supported by the authorities,

that an occasional gift or contribution made at the convenience or pleasure of the donor does not authorize an inference of dependency."

Measured by this standard, there was no dependency by the parents of Adrian Maneke as of the time of his injury. During the six months he had been in California, there had been but one contribution of $50. That sum does not represent a substantial contribution to the support of two people for a six-month period. That there was no need for support as of the time of injury is evidenced by the fact that the mother had authority to draw checks against a bank account containing approximately $1700 but did not find it necessary to exercise that authority. Indeed, the very language used by the mother in testifying negatives the existence of any need, for she said:

"Q. Did he give you any authority to draw checks on his bank?

A. Yes, he did.

Q. Did you draw any checks?

A. No, we hadn't, because I just thought, well, he was young and what he put in the bank I would just leave it and just let him give us what he wanted to, so we didn't draw none, but he says, [39] 'Mama, if you need it.' Now, I bought me a refrigerator last fall, we got it last winter, and he wanted to get that for me all last summer and he says 'Mama, if you need the money, just write a check on my account.' So my son over here [referring to Clarence Maneke, another son present at the hearing] got it for me and we didn't write no checks." (Tr. 68)

Deputy Commissioner Brown in framing his questions at the hearing took the position that contributions made for 12 months prior to the death of the employee should be considered. (See Tr. 39 and 41) But that is not the law. The statute states that dependency must be determined as of the time of injury. During the time that Adrian was working in Kansas City and regularly making contributions to his mother every two weeks, the parents well may have been dependent upon him. But that does not prove dependency at the time of injury. When Adrian left Missouri for California the relationship between him and his parents was altered completely. Not only were contributions no longer being made regularly but Adrian had no steady employment to afford a means for making contributions. He was injured on June 26, 1947, and had made but a single contribution in the month of February, or possibly March. A single contribution made at a date so remote from the date of injury can scarcely be characterized otherwise than as an "occasional contribution".

No case has been found which discusses the interpretation of the phrase "as of the time of the injury" as it is used in Section 9 (f) of the Longshoremen's and Harbor Workers' Compensation Act. However, there are a number of decisions by state Courts interpreting identical provisions in state workmen's compensation acts. An excellent statement of the rule to be applied is found in the Illinois case of *Robert Gair Co. v. Industrial Commission,* 340 Ill. 99, 172 N.E. 46, which involved a factual situation quite sim-

ilar to the facts in this case. In that case, the deceased son lived with his mother in Belleville, Illinois, during the year 1922 and the early part of 1923. In July, 1923, the deceased son moved to Quincy, Illinois. During the time he lived with his mother in Belleville, he contributed $10 a week to her support. In holding that the mother was not dependent as of the time of injury, the Court stated:

> "After his return to Quincy in July, 1923, the evidence shows that he once sent $10 to his mother. There is no evidence that from the time he left Belleville until his death, in September, 1923, he sent any further sum. Defendant in error [the mother] testified that he was saving money for her, awaiting the time when she would live with him again.
>
> Plaintiff in error argues that the evidence not only does not show dependency on the part of defendant in error but that it shows that she was not dependent and that deceased was not contributing to her in any substantial manner. The rule is that dependency must be based on evidence that the parent was dependent on the deceased for support at the time of the death of the deceased, and that he had been contributing to her in a substantial manner. * * * Evidence that during the time the deceased lived with defendant in error he contributed to her support is not sufficient to sustain an award, *for the reason that dependency prior to the time of death is not determinative. Such dependency must be shown to exist at the time of the decease of the employee. Where dependency existed but terminated before the accident, it, as a matter of law, does not exist.*

Wedron Silica Co. v. Industrial Comm., supra. The fact that defendant in error expected to be dependent upon deceased in the future or expected to live with him in the future, and that he was saving money for the time when she should live with him, is not sufficient to support an award, as the dependency must be at the time of the death and not a contemplated future dependency." (Emphasis supplied)

Another case that is in point is that of *MacDonald v. Employers Liability Assurance Corp.,* 120 Me. 52, 112 Atl. 719. As mentioned above, Deputy Commissioner Brown framed his questions at the hearing held in Lebanon, Missouri, on the assumption that it is material to consider all contributions made by the deceased employee for a year prior to his injury. In the *MacDonald* case, the Industrial Accident Commission of Maine had made a similar ruling. In holding that this ruling was erroneous, the Maine Supreme Court stated:

> "In determining 'dependency', accordingly, it becomes immaterial how much or how little the deceased may have contributed to the claimant in the past. It matters not how dependent the claimant may have been in the past; for the statute upon which his entire right wholly depends requires him to sustain the burden of proof that he was dependent for support 'at the time of injury'.
>
> The statute which defines 'dependency' repeats in every specification, whether in the case of a wife, husband, or child, that it shall be determined in accordance with the fact as the fact may have been 'at the time of the injury', *and hence admits*

no interpretation of its clear declaration that 'dependency' is based upon the status of the claimant at the time of the decease of the person upon whose death his claim is based." (Emphasis supplied)

Another quite recent decision with facts similar to the present case is the Delaware case of *Children's Bureau of Delaware v. Nissen,* 3 Ter. 209, 29 Atl. (2d) 603. In that case the father of the deceased employee was a farmer in Oregon. His daughter graduated from the University of Oregon in 1932 and worked as a social worker in the states of Oregon, Idaho, and Washington until the fall of 1938. During all this time, she made contributions for the support of her mother. In the fall of 1938, she went east to do graduate work at the Pennsylvania School of Social Work. She earned nothing until she began work with the Children's Bureau on June 1, 1939. She was killed on June 22, 1939. In denying the claim of the mother, the Court stated:

> "The statute limits the issue to the time of the death of the employee. It speaks of the reasonable present. The question is not one of a past dependency, nor of a possible future dependency. The evidence indisputably was that for some nine months prior to June 22, 1939, the deceased had contributed nothing to the claimant's support. * * * What future contributions she might make for the claimant's support, were possibilities dependent on earnings, inclination, health, marriage, and the mother's own financial position. This is a forbidden field of conjecture."

The compensation order in this case is equally subject to the criticism that it is based upon conjecture. Adrian Maneke had not had steady employment during the time he was in California, having shifted from Los Angeles to Modesto, and then to Oakland. He had worked for a month for General Engineering and Dry Dock Corporation but had made no contributions to his parents out of his earnings on that job. The award is apparently premised upon an assumption that regular contributions to the parents would be resumed, but any such assumption must necessarily be based upon speculation as to whether the position was to be a permanent one, as to whether Adrian's living expenses could be kept at a level where he would be in a position to make contributions to his parents, and as to whether other considerations might make future contributions a possibility. And it has been held that a compensation award under the Longshoremen's and Harbor Workers' Compensation Act based on conjecture is not in accordance with law. (*New Amsterdam Casualty Co. v. Hoage*, 46 Fed. (2d) 837)

II.

ENFORCEMENT OF THE AWARD SHOULD BE ENJOINED BECAUSE BENEFITS ARE PAYABLE ONLY "DURING SUCH DEPENDENCY" AND THE RECORD IN THIS CASE AFFIRMATIVELY SHOWS THAT THERE WAS NO CONTINUING DEPENDENCY ON THE PART OF THE CLAIMANTS.

Heretofore we have discussed subsection (f) of Section 9 of the Longshoremen's and Harbor Work-

ers' Compensation Act. A separate provision of subsection (d) of Section 9 provides that benefits shall be payable to partial dependents only "during such dependency". *Standard Dredging Corp. v. Henderson,* 150 Fed. (2d) 78, holds that compliance with subsection (d) is not shown merely by showing dependency as of the time of injury. It must also be shown that there is a continuing dependency on the part of the claimant.

The words "during such dependency" must mean that the compensation payments are required for the support of the dependents. But the record in this case shows no such continuing need on the part of the parents. The hearing was held on October 21, 1947, which was four months after the date of injury, and no contribution or payment of any sort had been received except in the sum of $50, paid in the preceding February or March. Yet the claimants still owned their farm and had available the income realized from the sale of its produce, and they still had a balance in their own bank account. Ability to support themselves by their own resources for the four months from the date of injury up to the date of hearing and still maintain a bank account is inconsistent with the concept of a continuing dependency entitling them to compensation benefits. As said by the Court in *Standard Dredging Corp. v. Henderson,* 150 Fed. (2d) 78, at 81:

> "The death benefits under the Act are not life insurance to be paid to someone in every case, but arise only when the relationship and circumstances exist which are stated in the Act."

CONCLUSION.

It is respectfully contended that the order dismissing the complaint for injunction should be reversed and that the case should be remanded to the District Court for a proper disposition of the issues of law.

Dated, San Francisco, California,
February 14, 1949.

Respectfully submitted,
LEONARD, HANNA & BROPHY,
DONALD R. BROPHY,
IVAN A. SCHWAB.
Attorneys for Appellants.